No. 07-73

Supreme Court, U.S.
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In The
Supreme Court of the United States

ISAAC DAYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Isn't it a violation of the Fifth Amendment's Grand Jury Clause, requiring reversal, to permit a jury to convict a defendant of bank fraud based on a theory of falsity different from the particular one alleged in the indictment?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit vacating the order of restitution but otherwise affirming petitioner's judgment of conviction is reported as *Untied States v. Klein*, 476 F.3d 111 (2d Cir. 2007) (Kearse, Walker and Winter, *Circuit Judges*), a copy of which is annexed hereto as Appendix A.

The Court of Appeals decided the issue raised in this petition by summary opinion reported as *United States v. Klein*, 216 Fed. Appx. 84 (2d Cir. February 5, 2007), a copy of which is annexed hereto as Appendix B.

The unreported order of the United States Court of Appeals for the Second Circuit, dated April 19, 2007, denying petitioner's petition for rehearing with a suggestion for rehearing *in banc* is annexed hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals which petitioner asks this Court to review was entered on February 5, 2007, and the order of that court denying petitioner's petition for rehearing was entered on April 19, 2007. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . .

18 U.S.C. §1344:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Petitioner Isaac Dayan, a 50-year-old wholesale diamond merchant with no prior criminal record, was indicted by a grand jury in the Southern District of New York in December 2003 on conspiracy and bank fraud charges for an alleged check kiting scheme (Counts One and Two) and allegedly submitting false loan applications to two federally insured banks, North Fork (Count Three) and Fleet (Count Four). His week-long jury trial culminated in his acquittal on Count Three and his conviction on Counts One, Two and Four.

Count Four charged that petitioner committed bank fraud, in violation of 18 U.S.C. §1344, as follows: "to wit, Dayan submitted to Fleet National Bank a small business credit application seeking a line of credit in the amount of approximately $100,000 on behalf of his business . . . that falsely and fraudulently reported sales of approximately $8,660,505 for the year 1999." JA. 44-45.[1]

At trial, however, the government was unable to prove the amount of petitioner's sales for 1999, and petitioner's accountant, testifying for the government, conceded that he never came to a final conclusion whether the $8.6 million figure was wrong. Petitioner's defense at trial, supported by his own testimony, was that the $8.6 million sales figure was essentially correct and, in any event, the sales figure was not material to Fleet's determination whether to grant him a small business loan, which depended

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1. "JA" refers to the joint appendix; "T" refers to the trial transcript; and "App. B" refers to the summary opinion of the Court of Appeals attached to this petition.

primarily upon petitioner's personal credit history. Indeed, a Fleet loan officer conceded at trial that, while a higher sales figure in a loan application is "better," petitioner would have been eligible for the loan even if his sales were as low as $500,000, a figure the government conceded was more than supportable. T. 446-50, 528-29. Finally, invoking the same defense, petitioner was acquitted on Count Three which was based on a nearly identical loan application to North Fork, whose loan officer testified that the sales figure "really [has] no significance."

Despite the specificity of the allegation of falsity in Count Four, the government invited the jury to convict on other false statements, including petitioner's statement in the loan application that he owed no back taxes (T. 1008), and the government argued in summation that petitioner's loan applications contained "all sorts of false financial information." T. 1049.

The court instructed the jury, over objection, that petitioner could be convicted on the basis of any false statement "material to the scheme" (JA. 86), and refused to give petitioner's proposed instruction that the jury could only convict on the basis of a false statement "as charged in the indictment." JA. 188. The jury returned during deliberations to ask:

> Question on counts 3 and 4: Does the definition of "attempt to defraud" include other information on the loan application besides the sales figures, or is the charge based only on the sales figures?

JA. 118-19. Petitioner urged the court to answer "no" to the jury's question, and to instruct the jury that they could only

convict on Count Four if they found that the sales figure was false. JA. 120-21,125, 130, 132.[2] Unsure how to respond, the court temporized, giving the jury copies of its original instructions. The jury returned soon after with its verdict, and petitioner was later sentenced to a 37-month prison term and $1.1 million in restitution.

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2. "I think that the issue here is not just a variance, but it's also *constructive amendment* of the indictment, which I think is what would be accomplished if the jury were told anything other than no, in response to this question." JA. 130 (emphasis added).

REASONS FOR GRANTING THE WRIT

In *Stirone v. United States*, 361 U.S. 212 (1960), this Court reversed a Hobbs Act conviction because the evidence admitted at trial and the instructions to the jury combined to permit a guilty verdict on a charge "the grand jury never made," in violation of the Fifth Amendment's Grand Jury Clause.[3] *Stirone* is understood to be the origin of the constitutional doctrine known as "constructive amendment," which *Stirone* held to be *per se* reversible error. *Id.* at 217.

In the nearly 50 years since *Stirone* was decided, the Court has never questioned its validity. Yet, the courts of appeals continue to struggle with the precise contours of the constructive amendment doctrine, producing division and conflict as to what constitutes a constructive amendment as opposed to a variance which warrants relief only upon a showing of prejudice. *See, e.g., United States v. Rigas*, ___ F.3d ___, 2007 WL 1518619 at *14 (2d Cir. 2007) ("Our constructive amendment jurisprudence has resulted in what we recently characterized as apparently 'divergent results'") (quoting *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (reversing on constructive amendment grounds)); *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) ("The line between a constructive amendment and a variance is at time difficult to draw"); *United States v. Antonakeas*, 255 F.3d 714, 722 (9th Cir. 2001) ("the distinction between an amendment to an indictment and a variance is blurred"); *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir.

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3. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const., Amend. V.

1986) ("the distinction between a variance and a constructive amendment is at best 'shadowy'").

Here, for example, the court of appeals affirmed petitioner's conviction on Count Four based on its finding that neither a constructive amendment nor a prejudicial variance had occurred, even though the jury was permitted to convict petitioner based on falsity completely different from the allegedly false sales figures charged in the indictment. App. B3-5. On closely analogous facts, the Fifth Circuit reversed the conviction on constructive amendment grounds. *United States v. Adams*, 778 F.2d 1117, 1122-25 (5th Cir. 1985) (indictment alleged that defendant purchased weapon by displaying identification false in one particular and jury was permitted to convict based on another kind of falsity in the identification). In *Adamson*, the Ninth Circuit eschewed Fifth Amendment analysis altogether and reversed the conviction on grounds of prejudicial variance, in violation of the Sixth Amendment. 291 F.3d at 614-16 (reversing wire fraud conviction where indictment alleged one kind of misrepresentation and government proved a different kind).[4]

The lower court's rejection of petitioner's constructive amendment argument is particularly puzzling in

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4. Even under a Sixth Amendment analysis, petitioner's conviction on Count Four should not have been upheld in light of defense counsel's understandable and undisputed surprise when, at the eleventh hour, he learned for the first time that the jury would be permitted to convict petitioner based on some other alleged falsity in the loan application, and not simply the 1999 sales figures. JA 124 ("I have to say, Your Honor, I don't think we were on notice at all that they [the government] might go to the jury on a theory that the sales numbers were just fine but that there was another false statement").

view of the indictment's "to wit" clause, i.e., petitioner's loan application was false and fraudulent in a very specific way, "to wit," it falsely overstated petitioner's sales figures for 1999. In common understanding, the term "to wit" further narrows and sharpens the allegation. *See, e.g., United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994) (reversing on constructive amendment grounds; "'[t]o wit' is an expression of limitation which, as our cases indicate, makes what follows an essential part of the charged offense"); *cf. Adamson*, 291 F.3d at 616 ("If the indictment had not specified a different particular misrepresentation, one might say the variance was benign [, but] [h]aving specified a different particular misrepresentation . . .the indictment not only failed to inform the defendant of the actual misrepresentation that would be shown at trial, but it also affirmatively misled the defendant . . ."). By contrast, in this case, the court of appeals, relying on its own decisions, held that "deviation from details described in the 'to wit' clauses was not fatal to the conviction." App. B5.[5]

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5. The Second Circuit relied on *United States v. Rivera*, 415 F.3d 284, 287 (2d Cir. 2005) (indictment alleged felon in possession of firearm when proof showed only possession of a firearm frame or receiver), and *United States v. Danielson*, 199 F.3d 666, 669 (2d Cir 1999) (indictment alleged possession of seven rounds of ammunition moving in interstate commerce but jury permitted to convict based only upon movement of the shells in interstate commerce). In those case, the convictions were upheld, despite "to wit" clauses, because the jury was permitted to convict on a theory narrower than the one charged in the indictment. *See United States v. Miller*, 471 U.S. 130 (1985) (rejecting constructive amendment claim when evidence and instructions narrowed the indictment's theory of prosecution). Here, the combination of the government's arguments and the court's instructions *broadened* the basis for conviction under

(continued...)

In short, as this case shows, no one can confidently predict in the Second Circuit or any other circuit the meaning of, and the protections afforded by, the Fifth Amendment's Grand Jury Clause, an untenable state of affairs. This Court should grant the writ to resolve the conflict and remove the confusion among the circuits as to the meaning of *Stirone* and the doctrine of constructive amendment. U.S. Sup. Ct. Rules 10(a) and 10(c).

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5. (...continued)
Count Four, i.e., from a false loan application scheme based on allegedly false sales figures to any other false statements the jury could find in the loan application, including whether petitioner owed back taxes.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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July 17, 2007

APPENDIX A

476 F.3d 111

UNITED STATES of America,
Appellee,

v.

David KLEIN, Pinhas Ben-Ari,
Defendants,

Isaac Dayan,
Defendant-Appellant.

Docket Nos. 05-3443-CR(L),
05-4199-CR(CON).

United States Court of Appeals,
Second Circuit.

Argued: April 24, 2006.

Decided: Feb. 5, 2007.

As Corrected March 8, 2007.

Richard A. Greenberg (Steven Y. Yurowitz, on the brief), Newman & Greenberg, New York, New York, for Defendant-Appellant.

Marc A. Weinstein, Assistant United States Attorney, (Michael J. Garcia, United States Attorney for the Southern District of New York, on the brief, Katherine Polk Failla, Assistant United States Attorney, of counsel), United States Attorney's Office for the Southern District of New York, New York, New York, for Appellee.

Before: KEARSE, WINTER, and WALKER, Circuit Judges.

WINTER, Circuit Judge.

Isaac Dayan appeals from his conviction by a jury and sentencing by Judge Baer for one count of conspiracy to commit bank fraud, one count of bank fraud in connection with a check-kiting scheme, and one count of fraudulently obtaining a bank loan.

Appellant advances numerous claims of error underlying his conviction, all but two of which are disposed of in a companion summary order filed this day (February 5, 2007). This opinion addresses his claims that the indictment was defective because it failed to state that his allegedly fraudulent conduct was material and that the order of restitution was unlawful because it explicitly precluded joint and several liability even though appellant's responsibility for the criminal acts was shared with other defendants. We affirm the conviction but remand the restitution order for further proceedings.

BACKGROUND

We view the evidence in the light most favorable to the government. *United States v. Ford,* 435 F.3d 204, 206 (2d Cir. 2006).

Appellant, a wholesale diamond dealer, was involved in a check-kiting scheme with other diamond dealers. Between December 1999 and March 2000, one Jacob Haas exchanged checks with appellant worth millions of dollars. The checks purported to be payments for purchases and sales of diamonds but no diamonds changed hands. When checks were exchanged, Haas and appellant would deposit the checks on the same day so that the respective checks would not bounce. These transactions covered shortfalls in Haas's bank account at the Merchants Bank of New York ("MBNY"). They pre-dated the checks to disguise the

scheme from the banks. They would also issue different numbers of checks to each other and avoided round numbers to create the appearance of actual diamond transactions. Other diamond dealers and firms joined the scheme, including David Klein (a co-defendant here), Meglark, Alison Gem, and Fine Diamonds. In September of 2000, Sammy Maslaton joined the scheme, exchanging over $1 million in checks with appellant on a single day. Appellant continued to kite checks with others involved in the scheme through early 2001. In all, tens of millions of dollars were exchanged with no assets backing up the checks.

In February and March 2001, some of the checks failed to clear, causing overdrafts in Haas's and Klein's accounts. MBNY stopped crediting Haas's and Klein's accounts, and the scheme collapsed, leaving appellant's accounts overdrawn by approximately $75,000.

Appellant also used the falsely inflated bank balances to support false sales figures that he included in loan applications to banks. Through his company Fortune Diamond Importers, he applied for a $100,000 loan from Chase Manhattan Bank in 1999, which granted him a $75,000 line of credit, a $75,000 loan from North Fork Bank, which granted it, and a $100,000 loan from Fleet National Bank, which also granted it. Appellant's accountant had created his general ledgers and financial statements using the firm's bank account statements, counting each check accepted from the co-conspirators as a diamond sale. (Appellant's tax returns showed much more modest sales). Appellant later asked Chase to increase his line of credit to $250,000, but Chase refused to do so.

Dayan was indicted on one count of conspiracy to commit bank fraud, one count of bank fraud in connection with the check-kiting scheme, and two counts of bank fraud for fraudulently obtaining loans from North Fork and Fleet. Two other defendants, David Klein and Pinhas Ben-Ari, pleaded guilty to various counts of the same indictment. Dayan was tried in December 2004 and was convicted by a jury on three of the four counts; he was acquitted of bank fraud against North Fork.

On June 15, 2005, Dayan was sentenced to 37 months' imprisonment, followed by three years of supervised release, and restitution of $1.1 million. Believing that the Probation Department could not administer joint and several liability for restitutive amounts that differed among multiple defendants, the court explicitly directed that appellant's restitution obligation not be joint and several.

DISCUSSION

We first address the claim that the indictment was defective because it failed to state that appellant's fraudulent acts were material. It is true that a bank fraud conviction requires a showing that the fraudulent conduct was material, *Neder v. United States,* 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), although the bank fraud statute does not contain that actual word. 18 U.S.C. § 1344. In *Neder,* the Supreme Court held that materiality was an element of bank fraud because the word fraud incorporated fraud's "well-settled meaning at common law" – a "misrepresentation or concealment of *material* fact." *Id.* at 22, 119 S.Ct. 1827. Appellant claims, therefore, that the indictment is insufficient because it does not explicitly

use the word "material." Appellant did not raise this issue in the district court, and thus we review only for plain error. *United States v. Acosta,* 470 F.3d 132, 135 (2d Cir. 2006) (per curiam).

There was no error. If materiality can be inferred to be an element of criminal fraud because of the well-understood meaning of "fraud" as a legal term, an allegation of materiality can be inferred from use of the word fraud in the indictment. Moreover, as commonly understood among both lawyers and laypersons, "fraud" refers to conduct or speech intended to mislead the putative victim into parting with money or property. *See United States v. Resendiz-Ponce*, ___ U.S. ___, 127 S.Ct. 782, 784, 166 L.Ed.2d 591 (2007) (agreeing with the Government that "the indictment at bar implicitly alleged that respondent engaged in the necessary overt act simply by alleging that he attempted to enter the United States," because "[n]ot only does the word "attempt" as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements" of the crime of attempted illegal reentry (internal quotation marks omitted)). The materiality of the misleading conduct or speech is therefore at the heart of the word "fraud." Conduct or speech that is immaterial – irrelevant – to a putative victim cannot be fraud. Finally, each of the counts on which appellant was convicted contained an allegation that he obtained money or credit "by means of false or fraudulent . . . representations." Again, one cannot fraudulently induce a victim to part with money or credit "by means of" immaterial representations.

Appellant also claims that the restitution order must be vacated and remanded because it precludes joint and

several liability with others among whom he shares culpability. The jury found Dayan responsible for over $800,000 on Count One, over $1.5 million on Count Two, and over $70,000 on Count Four. At the sentencing, the district court downwardly departed four levels to the loss range suggested by defense counsel, of $200,000 to $350,000, on the grounds that the $1.5 million loss was greater than Dayan's culpability. However, the order of restitution of $1.1 million imposed on appellant is the sum of co-conspirator Klein's $600,000 outstanding liability to MBNY and of co-conspirator Haas's $500,000 outstanding liability to the same bank. Dayan had already returned amounts covering his own overdrafts.

The district court's calculation of restitution was erroneous because co-defendants may be proportionally or jointly and severally liable for restitution when they are all culpable, *see* 18 U.S.C. § 3664(h), and the government concedes that the district court's view that the Probation Department cannot administer varying restitution amounts that are joint and several is "mistaken." The error in precluding joint and several liability may have led to a combination of restitution orders that exceeds the bank's losses. *United States v. Nucci,* 364 F.3d 419, 423 (2d Cir. 2004) (finding that under 18 U.S.C. § 3664(f)(1)(A), (h), (j)(2), a given victim may not receive compensation in excess of his loss, thus effectively requiring proportional or joint and several liability for co-defendants). If so, appellant's obligation must be adjusted to prevent such an outcome. Moreover, the lack of joint and several liability may have induced further error in apportioning the amount of restitution for which appellant should be responsible. We therefore remand to the district court so that it may recalculate the amount and terms of Dayan's

restitution in light of its authority to order proportionate or joint and several liability.

CONCLUSION

We affirm the conviction but vacate the restitution order and remand for further proceedings in accordance with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court Of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of February, two thousand and seven.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE RALPH K. WINTER,
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID KLEIN, PINHAS BEN-ARI, Nos. 05-3443-cr(L), 05-4199-cr(CON)

Defendants,

ISAAC DAYAN,

Defendant-Appellant.

RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), Newman & Greenberg, New York, New York, *for Defendant-Appellant*.

MARC A. WEINSTEIN, Assistant United States Attorney (Michael J.

Garcia, United States Attorney for the Southern District of New York, *on the brief*, Katherine Polk Failla, Assistant United States Attorney, *of counsel*), United States Attorney's Office for the Southern District of New York, New York, New York, *for Appellee*.

Appeal from a conviction and sentence in the United States District Court for the Southern District of New York (Baer, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that appellant's conviction is AFFIRMED but the order of restitution is REMANDED.

Isaac Dayan appeals from his conviction by a jury and sentence before Judge Baer for one count of conspiracy to commit bank fraud, one count of bank fraud in connection with a check-kiting scheme, and one count of bank fraud for fraudulently obtaining a loan. The facts and procedural history are recounted in our opinion addressing appellant's claim of a defective indictment and of error in the restitution order, filed this day (February 5, 2007).

With regard to his conviction, Dayan argues that: (i) it was an impermissible constructive amendment to the indictment to allow the jury to convict on findings that the loan application was false in any respect but sales records; (ii) Count Two did not state an offense, and the government's evidence on Count Two was insufficient as a matter of law; (iii) the jury should not have been given a conscious avoidance instruction; (iv) the government should not have been allowed to present evidence of Dayan's transfers of money from his business accounts to his brokerage

accounts; (v) the jury instructions on bank fraud were erroneous; and (vi) the jury should not have been told that it could convict Dayan of bank fraud against an Antwerp bank that was not proven to be a financial institution within the meaning of the bank fraud statute. We conclude that these arguments lack merit and affirm.

a) Constructive Amendment of an Indictment

Count Four of the indictment charged Dayan with bank fraud for submitting a loan application to Fleet National Bank that "falsely and fraudulently reported sales of approximately $8,660,505 for the year 1999" for his business Fortune Diamond Importers. Dayan argues that he was convicted on Count Four because the government relied at trial on other false statements in his application, such as the statement that he owed no back taxes.

Judge Baer instructed the jury that it could convict on finding any false statement in the loan application that was material to the scheme. When the jury asked during deliberations whether it could convict on Count Four based on false statements in the loan application other than the sales figures, the judge sent the jury a copy of the instructions summarizing the bank fraud charges and stating the elements of bank fraud.

To demonstrate that an indictment was constructively amended, the defendant must show "that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Salmonese,* 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks omitted). "The Fifth

Amendment's indictment clause prohibits 'constructive amendments' of an indictment when the government's evidence and the jury instructions 'modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury.'" *LanFranco v. Murray,* 313 F.3d 112, 118 n.1 (2d Cir. 2002). An "essential element" of the offense is modified only when the defendant was not "given notice of the core of criminality to be proven at trial." *See id.* (internal quotation marks omitted). The evidence at trial must "broaden[] the basis of conviction beyond that charged in the indictment." *United States v. Patino,* 962 F.2d 263, 265 (2d Cir. 1992).

By contrast, a variance occurs where "the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States v. Thomas,* 274 F.3d 655, 670 (2d Cir. 2001) (internal quotation marks omitted). A variance is not prejudicial, and not grounds for reversal, "where the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense." *United States v. Mucciante,* 21 F.3d 1228, 1236 (2d Cir. 1994) (internal quotation marks omitted).

The false sales figures were contained within a "to wit" clause, and our holdings show that details contained in a "to wit" clause do not *per se* bar a trial court from instructing a jury that it may convict even if only related and unmentioned details were proven at trial. *See United States v. Rivera,* 415 F.3d 284, 287 (2d Cir. 2005)

(constructive amendment, variance); *United States v. Danielson,* 199 F.3d 666, 669 (2d Cir. 1999) (constructive amendment). Each of these decisions held that deviation from the details described in the "to wit" clauses was not fatal to the conviction.

Nor was there any prejudicial variance. Although the government did elicit an admission from Dayan that he had failed to report his tax liability on the loan application to Fleet, they also devoted substantial time and testimony to their original theory that he falsified his sales figures on the application. There is simply no risk of appellant's defense having been impaired by a lack of notice of what crimes were charged. Further, the identification of the loan applications in the indictment clearly avoids the risk of Dayan being tried twice for the same offenses.

b) Offense Stated in Count Two

We review a claim that an indictment does not state an offense only to determine whether the indictment "charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Walsh,* 194 F.3d 37, 44 (2d Cir. 1999) (internal quotation marks omitted). An indictment is sufficient if "it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States,* 418 U.S. 87, 117 (1974).

Dayan argues that the indictment failed to allege that the checks that he received from others and deposited were not covered by funds in the others' accounts. He also argues that it failed to allege the false representations to a financial institution necessary to commit "embellished" check-kiting under 18 U.S.C. § 1344(2), which requires false representations in addition to check-kiting itself. *See United States v. Burnett,* 10 F.3d 74, 78-79 (2d Cir. 1993).

Section 1344 defines bank fraud as "a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." The present indictment tracks the language of both sections of the statute. It sufficiently describes a scheme to defraud a financial institution under Section 1344(1), because Paragraph Seven, which alleges that the counter-parties did not have adequate funds in their accounts to cover the checks Dayan deposited, is incorporated in the other counts. The false representations required by Section 1344(2) were sufficiently alleged by Paragraph Seven's charge of falsely representing inflated sales figures to obtain credit for his businesses, again incorporated in the counts charging Dayan with using those sales figures to falsify loan applications. The indictment clearly informed Dayan of the charges against him and was easily sufficient to ensure that he will not be prosecuted twice for the same offense. *Hamling,* 418 U.S. at 117.

Appellant also contends that the evidence on Count Two was insufficient because the government did not prove that the co-conspirators lacked sufficient funds to cover their checks to Dayan. In reviewing insufficiency

claims, we may "overturn the conviction only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Walsh,* 194 F.3d at 51 (citation omitted). At trial, Haas testified that he issued checks to Dayan that his account could not cover, and that he had informed Dayan of that. Dayan admitted that he had written checks to the alleged co-conspirators that his accounts could not cover. Further, the scheme fell apart in February and March of 2001 as checks written by other alleged co-conspirators to Dayan began to bounce. This evidence was easily sufficient to allow a reasonable trier of fact to find that the co-conspirators lacked sufficient funds to cover their checks.

c) Admissibility of Evidence

We review rulings on the admissibility of evidence for abuse of discretion. *United States v. Salameh,* 152 F.3d 88, 110 (2d Cir. 1998). The government introduced evidence at the trial that, during the alleged check-kiting scheme, Dayan deposited nearly $3 million from one of the accounts used in the scheme to brokerage accounts at Merrill Lynch. The government argued that this evidence showed Dayan had personally profited from the fraud. The district court admitted the evidence on the grounds that although it was not very probative, it was also not very prejudicial. Although the checks Dayan sent to Merrill Lynch for the brokerage account never bounced, the government offered evidence that he often sent checks to Merrill Lynch with insufficient funds in his account and then deposited checks from his co-conspirators to cover them. We find no abuse of discretion in the admission of this evidence.

d) Jury Instructions

We review claims of error in jury instructions *de novo,* reversing only if "viewing the charge as a whole, there was a prejudicial error." *United States v. Aina-Marshall,* 336 F.3d 167, 170 (2d Cir. 2003). Dayan challenges three distinct aspects of the jury instructions: the instruction on conscious avoidance, the definition of bank fraud, and the lack of any instruction on the definition of a financial institution.

1) Conscious Avoidance

"A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt 'that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *United States v. Zedner,* 401 F.3d 36, 50 (2d Cir. 2005) (citations omitted), *rev'd on other grounds,* ___ U.S. ___, 126 S.Ct. 1976 (2006).

We find no error in the district court's instructions regarding the elements of the conscious avoidance doctrine. The only issue, therefore, is whether the instruction should have been given at all.

There was no error in giving such an instruction. Dayan testified that he did not know his conduct was wrong and that the banks knew of his conduct and were "fine with it." He also argued that he did not know the purpose of the check-trading was bank fraud. However, the government proved several suspicious circumstances that would have alerted Dayan to the fraud unless he consciously avoided knowledge: the need for Dayan and the counter-parties to make deposits simultaneously;

receiving multiple checks at the same time from the same party; differing numbers of checks used to make and repay the "loans"; and consistently exchanging slightly unequal amounts. Because Dayan's knowledge was at issue and there was evidence that would allow a jury to find conscious avoidance, the jury instruction was proper.

2) Definition of Bank Fraud

Under 18 U.S.C. § 1344, bank fraud is defined as the knowing execution of "a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." As there was no objection to the portions of the jury charge now challenged on appeal, we review for plain error. Fed. R. Crim. P. 52(b), *Johnson v. United States,* 520 U.S. 461, 466-67 (1997).

Dayan challenges three parts of the jury charge: (i) that the jury could consider whether the banks at issue had given their "informed consent" as a substitute for intent to deceive; (ii) that the jury could convict based on the omission or concealment of a material fact, and (iii) the instruction on materiality. The district court's charge largely followed the standard jury instructions for bank fraud as set out in 2A O'Malley et al., Federal Jury Practice & Instructions §§ 47.09-47.11 (5th ed. 2000). Elaborating further on the elements, the district judge instructed the jury that "[t]o act with 'intent to defraud' means to act willfully and with intent to deceive for the purpose of causing some financial loss or risk of financial loss to another – here, to obtain money or property from a bank

without the company's informed consent." The judge also instructed the jury that it could convict Dayan of bank fraud under Section 1344(2) if it found Dayan deceived the bank through "intentional omission or concealment of facts that make what was written, said, or done deliberately misleading." Although he instructed the jury that it must find the false representations and pretenses "material" to convict Dayan of a Section 1344(2) offense, it is not clear whether the instruction was also intended to apply to the Section 1344(1) charge.

The phrase "informed consent" does not appear in any of the model jury instructions. Rather, the language was taken from the government's suggested jury instructions. Considering the jury instructions as a whole, *United States v. Mitchell,* 328 F.3d 77, 82 (2d Cir. 2003), we conclude that the jury was accurately advised on the applicable law despite the reference to the banks' "informed consent," because the court thereafter clearly instructed the jury that "'[e]ssential to a scheme to defraud is fraudulent intent' and that 'the proof must demonstrate that the defendant had a conscious, knowing intent to defraud and that the defendant contemplated or intended some harm to the property rights of the victim.'"

As for the "intentional omission or concealment" portion of the charge, Dayan's own counsel had suggested very similar language. When a defendant asks for the instruction that he or she later challenges as erroneous, the "invited error" doctrine bars the defendant from challenging that instruction on appeal. *United States v. Young,* 745 F.2d 733, 752 (2d Cir. 1984).

Dayan proposed a jury instruction that echoed the last phrase of Section 1344(2), stating "[a] pretense, representation or promise is false or fraudulent if it was falsely made with the intent to deceive. Deceitful statements of half truth, the *concealment of material facts,* and the expression of an opinion not honestly entertained may constitute false or fraudulent pretenses, representations or promises under the bank fraud statute." (Emphasis added). As the district court's charge echoed the defense's request in only slightly different language, the invited error doctrine bars Dayan from challenging this instruction.

Dayan also asserts that the district court failed to instruct the jury that materiality is an element of bank fraud under Section 1344(1), as well as Section 1344(2). Under *Neder v. United States,* 527 U.S. 1, 25 (1999), a falsehood must be material under the federal bank fraud statutes. Although the judge instructed the jury on materiality, it is not clear whether his instruction applied only to the charge under Section 1344(2), or to both charges. Nevertheless, because this portion of the charge could be read to apply to both sections of 1344, there was no plain error.

3) Definition of Financial Institution

Dayan argues that the omission from the jury charge of the jurisdictional element of bank fraud was error because trial testimony included a reference to Antwerpse Diamantbank ("ADB"), a foreign bank.

A foreign bank may be a financial institution if it is "a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978)." 18 U.S.C. § 20(9). The

definitions of "branch" and "agency" in the International Banking Act of 1978 both require, *inter alia,* an "office or . . . place of business of a foreign bank located in any State of the United States." 12 U.S.C. § 3101(1), (3).

Dayan argues that it was error not to instruct the jury about the jurisdictional elements for bank fraud involving a foreign bank. However, Dayan's trial counsel waived any such instructions at the charge conference:

> THE COURT: What about the federally insured concept, which goes on for three pages? Maybe I'm wrong. Maybe only two. The No. 23, two pages, a page and a sentence. Is there some need, you really believe, you haven't brought out and anybody would doubt that these are federally insured banks?
>
> MR. WEINSTEIN: It's very clear, your Honor.
>
> THE COURT: I'm taking it out.
>
> MR. WEINSTEIN: As long as that's something they're waiving as well.
>
> THE COURT: As long as you have no problem. If you have a problem about where this took place, you ought to tell me.
>
> MR: WOHL: I have no problem.

If, as Dayan now claims, he intended to waive only the federally insured aspect of the jurisdictional element, he surely would have questioned the omission of the foreign bank aspect after the charge was given.

Moreover, ADB's role in this trial was entirely peripheral, its only connection being that it lent Haas $3 million during the time of the scheme. ADB's subsequent losses

were due to Haas' failure to pay back that line of credit, which was arguably a collateral result of the check-kiting scheme, and occurred a year after Dayan stopped exchanging checks with Haas. On these facts, the district court's failure to charge the jury on the definition of a financial institution was not such a miscarriage of justice, if a miscarriage at all, as to vitiate a waiver of the issue.

We therefore affirm the conviction but vacate and remand the restitution order for reasons stated in the accompanying published opinion.

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: _____

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK (Filed Apr. 19, 2007)

Date:

Docket Number:	05-3443-cr
Short Title:	USA v. Klein (Dayan)
DC Docket Number:	03-cr-1471
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Harold Baer

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of April two thousand seven.

USA v. Dayan

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant ISAAC DAYAN. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Arthur Heller
Motion Staff Attorney

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(3)

No. 07-73

In the Supreme Court of the United States

ISAAC DAYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the jury instructions given at petitioner's trial impermissibly departed from the terms of a "to wit" clause in the indictment so as either to effect a constructive amendment of the indictment or to result in a prejudicial variance.

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In the Supreme Court of the United States

No. 07-73

ISAAC DAYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A7) is reported at 476 F.3d 111. An additional opinion of the court of appeals (Pet. App. B1-B13) is not published in the *Federal Reporter* but is reprinted in 216 Fed. Appx. 84.

JURISDICTION

The judgment of the court of appeals was originally entered on February 5, 2007. A corrected judgment was entered on March 8, 2007. A petition for rehearing was denied on April 19, 2007 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on July 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit bank fraud, in violation of 18 U.S.C. 371; bank fraud in connection with a check-kiting scheme, in violation of 18 U.S.C. 1344; and bank fraud in connection with fraudulently obtaining a bank loan, in violation of 18 U.S.C. 1344. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release, and ordered to pay $1.1 million in restitution. The court of appeals affirmed petitioner's convictions, but vacated the restitution order and remanded for further proceedings. Pet. App. A1-A7, B1-B13.

1. Between December 1999 and March 2001, petitioner, a wholesale diamond dealer in New York City, was involved in a check-kiting scheme with other diamond dealers. Throughout that period, petitioner and other diamond dealers exchanged checks worth millions of dollars. Ostensibly, the checks were payments for purchases and sales of diamonds, but no diamonds actually changed hands. When the checks were exchanged, petitioner and another diamond dealer would deposit the checks on the same day so that the respective checks would not bounce. Petitioner and the other dealers would often pre-date the checks to disguise the scheme from the banks. They would also issue different numbers of checks to each other and take other steps to create the appearance of actual diamond transactions. In all, tens of millions of dollars were exchanged with no assets backing up the checks. In February and March 2001, some of the checks failed to clear, and the scheme collapsed, leaving petitioner's accounts overdrawn by approximately $75,000. Pet. App. A2-A3.

While the scheme was ongoing, petitioner used the falsely inflated bank balances to support fabricated sales figures that he included in loan applications to various banks. Through his company, Fortune Diamond Importers, petitioner applied for a $100,000 loan from Chase Manhattan Bank; a $75,000 loan from North Fork Bank; and a $100,000 loan from Fleet National Bank. Chase Manhattan Bank granted petitioner a $75,000 line of credit, and North Fork Bank and Fleet National Bank each granted petitioner's loan request in full. In the Fleet loan application, petitioner asserted that he had $8,660,505 in sales for 1999—a figure based on general ledgers and financial statements that petitioner's accountant derived from the firm's bank account statements, counting each check accepted from the co-conspirators as a diamond sale; in fact, petitioner's tax returns showed much more modest sales. In addition, in response to the question on the Fleet loan application "[d]o you or does your business owe any taxes for years prior to the current year," petitioner answered "[n]o." Pet. App. A3, B3; C.A. App. 626.

2. A federal grand jury returned a four-count indictment against petitioner and two co-defendants. Count 1 charged him with conspiracy to commit bank fraud, in violation of 18 U.S.C. 371. Count 2 charged him with bank fraud based on the check-kiting scheme, in violation of 18 U.S.C. 1344. Count 3 charged him with bank fraud based on the fraudulent loan from North Fork Bank, in violation of 18 U.S.C. 1344. Count 4 charged him with bank fraud based on the fraudulent loan from Fleet National Bank, in violation of 18 U.S.C. 1344. As relevant here, Count 4 alleged that petitioner executed a scheme or artifice to defraud Fleet National Bank

> by means of false and fraudulent pretenses, representations, and promises, to wit, [petitioner] submitted to Fleet National Bank a small business credit application seeking a line of credit in the amount of approximately $100,000 on behalf of his business, Fortune Diamond Importers, that falsely and fraudulently reported sales of approximately $8,660,505 for the year 1999.

Indictment 8.[1] Petitioner's co-defendants pleaded guilty to various counts of the same indictment; petitioner elected to stand trial. Pet. App. A4.

3. At trial, the government devoted "substantial time and testimony" to establishing, with respect to Count 4, that petitioner defrauded Fleet by falsifying his sales figures on his loan application. Pet. App. B5. On cross-examination, the government elicited an admission from petitioner that he had misrepresented in the same application that he did not owe any back taxes. *Ibid.*; 12/20/04 Tr. 1008. Although the government, in its closing argument, told the jury that it would "go through some of the evidence showing beyond a reasonable doubt that [petitioner] submitted applications with all sorts of false financial information on them to get those loans," *id.* at 1049, the government's review of the specific evidence presented to support Counts 3 and 4 (the fraudulent loan charges) emphasized the falsity of the sales figures and did not call the jury's attention to other statements made in the applications, such as the statement that petitioner owed no back taxes. See *id.* at 1074-1078. At no time during the summation or rebuttal

---

[1] The indictment used a similar "to wit" clause in Count 3 with regard to the North Fork Bank loan that alleged fraudulent 1998 sales of approximately $5 million. Indictment 7.

did the government direct the jury to information other than the false sales figures as the bases for conviction on those two counts. See *id.* at 1118 (reviewing the evidence showing inflated sales figures).

Before instructing the jury on the law, the district court provided the parties with its proposed jury instructions. Those instructions contained, among other things, a paragraph summarizing the three substantive bank fraud counts (Counts 2, 3 and 4), including a statement that the loan aspect of the scheme to defraud focused on petitioner's "applying for two lines of credit using false and fraudulent information in support of those applications." C.A. App. 204 (alterations omitted). During the December 17, 2004, charging conference, the government, consistent with Second Circuit precedent, maintained that the false statements mentioned in the "to wit" clauses in Counts 3 and 4 did not "limit[]" the government by preventing it from relying on other false statements in the respective loan applications to support a conviction. *Id.* at 171. Petitioner objected that, without such a limitation, the government would be able to convict petitioner on a theory not charged in the indictment. The next day, petitioner submitted a letter requesting that the instruction be revised to read, "by applying for two lines of credit using false information *about his business' sales* in support of those applications." *Id.* at 204 (as altered) (emphasis added). Petitioner did not otherwise object to the instruction on the elements of bank fraud. The government responded in writing, asserting that "the Court should not limit its instruction about the fraudulent information in [petitioner's] line of credit application to the false statements about [petitioner's] business' sales" because "[t]he applications also contain false information about [peti-

tioner's] salary as well as other matters, and are fraudulent for those reasons as well." *Id.* at 208.

In its final charge, the district court began by summarizing Counts 3 and 4, noting, "Counts Three and Four also charge bank fraud. * * * Count Four charges that, in or about October 2000, [petitioner] submitted to Fleet National an application seeking a line of credit in the amount of $100,000 on behalf of Fortune Diamond Importers that * * * falsely reported its sales figures." C.A. App. 63-64. The court then read the indictment to the jury, including the "to wit" clauses in Counts 3 and 4. See *id.* at 83-84. The court next instructed the jury on the elements of bank fraud, the offense charged in Counts 2, 3 and 4. The court explained that a conviction requires proof beyond a reasonable doubt that the defendant devised a scheme or artifice to defraud a bank "by means of false or fraudulent pretenses, representations or promises that were material to the scheme." *Id.* at 86. It further explained that

> the false representations and pretenses must be "material." * * * A "material" fact is one which reasonably would be expected to be of concern to a reasonable and prudent person relying on the statement or writing in making a decision. That means that if you find a particular statement or writing to have been untruthful, before you can find that statement or omission to be material, you must also find that the statement or omission was one that would have mattered to a reasonable person who was making a decision on the matter.

Id. at 88. The court then reminded the jury that

> [t]he government has offered evidence that the government contends shows that the defendant engaged

> in fraudulent activities on occasions other than those charged in the indictment. Specifically, the government has offered evidence of exchanges of checks at times other than that alleged in the indictment and evidence concerning the defendant's tax matters.
>
> In connection with that, let me remind you that the defendant is not on trial for committing acts that are not alleged in the indictment. Accordingly, you may not consider any evidence of similar acts as a substitute for proof that the defendant committed the crimes charged.

C.A. App. 97-98. Finally, the court instructed the jury that "[t]he law only requires a substantial similarity between" the allegations in the indictment and the facts proved at trial. *Id.* at 99. Specifically, the court explained,

> if the indictment charges that certain monetary amounts were involved and the testimony or exhibits indicate that in fact different amounts were involved, it is sufficient if you find that the amounts involved are substantially similar to the amounts as alleged in the indictment.
>
> The same goes for most of the other factual contentions in the indictment—the law only requires substantial similarity between the indictment and the proof; that is sufficient. However, if you find that the difference between the allegations and the proof is material, then you must find the defendant not guilty.

Id. at 99-100.

During deliberations, the jury sent two notes to the court on Counts 3 and 4. The first note requested the text of the charges from the indictment. The second note asked whether the definition of an "attempt to defraud" "include[s] *other* information on the loan applications besides the sales figures, or is the charge based only on the sales figures?" C.A. App. 145. After conferring with counsel, the court, in response to the first question, provided the jury with the text of the charges for Counts 3 and 4. *Id.* at 141. In response to the second question, the government reiterated its view to the court that the "to wit" clauses were not "exclusive" and that the jury should be able to consider other false statements as well. *Id.* at 119. Petitioner argued otherwise and asserted that he had not received "any notice that [the government was] going to the jury on a different theory." *Id.* at 121. Petitioner stated that if the court were inclined to provide an answer other than "no," counsel would like additional time to research the matter. *Id.* at 125. The court agreed and deferred an answer to that question at that time. In the meantime, per petitioner's request, the court decided to resubmit the initial jury charge on bank fraud and ask the jury whether that information answered its questions. *Id.* at 133. If not, the court stated that the issue would be discussed further the next morning, as the court day was approaching an end. *Id.* at 132-133. The district court then resubmitted its initial charge on bank fraud. Before the jury retired for the day, and before the court could hear further argument from the parties' attorneys, the jury returned a verdict convicting petitioner on Counts 1, 2 and 4 and acquitting him on Count 3.

Petitioner was sentenced to 37 months of imprisonment, to be followed by three years of supervised re-

lease, and ordered to make restitution of $1.1 million. Believing that the probation office could not administer joint and several liability for amounts of restitution that differed among multiple defendants, the district court explicitly directed that petitioner's restitution obligation not be joint and several. Pet. App. A4.

4. On appeal, petitioner raised numerous claims of error. The court of appeals issued two separate opinions, one published and one unpublished, in which it affirmed petitioner's convictions but vacated the restitution order and remanded for resentencing. Pet. App. A2.

a. As relevant here, in the published opinion, Pet. App. A1-A7, the court of appeals concluded that the district court had erred in its belief that it could not impose joint and several liability for the restitution order. The court therefore "vacate[d] the restitution order and remand[ed] for further proceedings in accordance with this opinion." *Id.* at A7.

b. In the unpublished opinion, the court rejected petitioner's six remaining contentions, the first of which was that the jury instructions constructively amended the indictment by allowing the jury to convict petitioner if it found that any false statement in the loan application (such as the statement that he owed no back taxes) was material to the scheme, because the indictment's "to wit" clause limited the basis of the charge in Count 4 to one specific false statement (concerning the false sales figures). Pet. App. B3-B4. The court concluded that "details contained in a 'to wit' clause do not *per se* bar a trial court from instructing a jury that it may convict even if only related and unmentioned details were proven at trial." *Id.* at B4. Relying on *United States* v. *Rivera*, 415 F.3d 284, 287 (2d Cir. 2005), and *United States* v.

Danielson, 199 F.3d 666, 669 (2d Cir. 1999), the court explained "that deviation from the details described in the 'to wit' clauses" did not amount to a "fatal" constructive amendment of the indictment. Pet. App. B5.

"Nor," the court concluded, "was there any prejudicial variance." Pet. App. B5. Although the government did elicit an admission from petitioner that he had failed to report his tax liability on the loan application on cross-examination, the court emphasized that the government "devoted substantial time and testimony to [its] original theory that he falsified his sales figures on the application." *Ibid.* Under those circumstances, there was "simply no risk of [petitioner's] defense having been impaired by a lack of notice of what crimes were charged." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-9) that the jury instructions on Count 4 constructively amended the indictment by allowing the jury to convict petitioner "based on falsity completely different from the allegedly false sales figures" set forth in the "to wit" clause in Count 4 of the indictment. Pet. 7. Petitioner suggests that this Court's review is warranted to "remove the confusion" concerning the constructive amendment doctrine, as well as its relationship to the variance doctrine. Pet. 9. The court of appeals' conclusion that petitioner is not entitled to relief is correct, and further review is not warranted.

1. As a preliminary matter, the petition for a writ of certiorari should be denied because of its interlocutory posture. The court of appeals vacated the sentence insofar as it ordered restitution and remanded the case "for further proceedings." Pet. App. A7, B13. This Court typically awaits final judgment before exercising certio-

rari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of a writ of certiorari). Lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). To avoid disruption of pending criminal cases, this Court ordinarily denies petitions for a writ of certiorari by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002) (Stern); see also *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (recognizing this Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"). That practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition for a writ of certiorari to the Court. See Stern § 4.18, at 258 n.59. Although the remand here was narrow, that fact neither deprives the judgment of its nonfinal nature nor prejudices petitioner's ability to file a subsequent petition from a final judgment. Cf. *Brotherhood of Locomotive Firemen*, 389 U.S. at 328.

2. In any event, petitioner's fact-bound claim does not merit this Court's review. Contrary to petitioner's contention, the record reflects that there was neither a constructive amendment of nor a variance from the indictment.

a. The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. This Court has repeatedly held that the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment. See, *e.g.*, *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 787 (2007); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). An indictment, however, need not allege all of the facts that the government intends to prove at trial; it is ordinarily sufficient for an indictment to provide factual detail only with regard to non-elements such as time and place. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 218 (1960); *Cochran & Sayre* v. *United States*, 157 U.S. 286, 290 (1895); *United States* v. *Britton*, 107 U.S. 655, 663 (1883). Nevertheless, an indictment may specify the particular facts that constitute an element of the offense. And if the government subsequently proves different facts at trial to establish that element, and the jury instructions permit a conviction on that different basis, a Grand Jury Clause violation may result.

While "proof at trial need not, indeed cannot, be a precise replica of the charges contained in the indictment * * * , [a] substantial deviation of instructions from an indictment is impermissible because first it requires a defendant to answer a criminal charge that was not brought by a grand jury, * * * and second it denies the defendant sufficient notice to prepare and present an adequate defense." *United States* v. *Lemire*, 720 F.2d 1327, 1344 (D.C. Cir. 1983) (internal quotation

marks and citations omitted), cert. denied, 467 U.S. 1226 (1984). Lower courts have treated factual differences between the government's evidence at trial and the factual theory specified in the indictment in two ways. Where "either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment," lower courts have characterized the divergence as a "constructive amendment" of the indictment, and have held that it constitutes structural error (thus requiring automatic reversal). *United States* v. *Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks and citation omitted); see 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.6(c), at 809 & n.23 (2d ed. 1999) (LaFave) (citing cases). Where "the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment," lower courts have characterized it as a mere "variance" from the indictment. *Salmonese*, 352 F.3d at 621. A court will find a variance to be harmless error unless it "is likely to have caused surprise or otherwise been prejudicial to the defense." 4 LaFave § 19.6(c) at 809 & n.23 (citing cases).

b. The jury instructions and evidence presented in this case neither constructively amended the charge nor resulted in a prejudicial variance.

First, the jury instructions did not constructively amend the indictment. Contrary to petitioner's contention (Pet. 7) that the "jury was permitted to convict petitioner based on falsity completely different from the allegedly false sales figures charged in the indictment," the instructions did not invite conviction based on a

broader basis than was charged in the indictment. During its charge to the jury, the court read the entire text of the indictment, including the "to wit" clause in Counts 3 and 4. It also reminded the jury that "the defendant is not on trial for committing acts that are not alleged in the indictment. Accordingly, you may not consider any evidence of similar acts as a substitute for proof that the defendant committed the crimes charged." C.A. App. 98; *id.* at 100 (explaining that "the law only requires substantial similarity between the indictment and the proof; that is sufficient. However, if you find that the difference between the allegations and the proof is material, then you must find the defendant not guilty"). Taking the instructions as a whole, the jury would have understood that it was required to find the facts charged in the indictment (including the "to wit" clause), rather than materially different "facts not alleged in the indictment," in order to find petitioner guilty. Those instructions thus did not permit reliance on false statements in the loan applications pertaining to tax liability. Because the instructions were clear on that point, the district court's response to the jury's request for clarification by resubmitting the relevant instructions to the jury was appropriate. See *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000).

Moreover, the reality is that, in light of the instructions on the elements of the crime and the proof presented, the jury could not have rested its verdict on any basis other than the false sales figures included in the loan applications. See Gov't C.A. Br. 35-37. While the loan applications included a variety of information that the jury could have concluded was false, the jury was instructed that, to find petitioner guilty of bank fraud, it had to find a false statement that was *material* to the

bank. *Id.* at 36; C.A. App. 88. The only basis for finding that petitioner made a *material* false statement was testimony from a bank representative who stated that the only factors that the bank considered in approving a small business loan like petitioner's was the applicant's credit history and business sales. Gov't C.A. Br. 36. There was no evidence that would have supported a finding that any other false statement on the loan applications was material. In light of the virtually universal presumption that the jury follows its instructions, see, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 394 (1999), the record precludes the possibility that the jury might have found petitioner guilty based on any theory other than the one explicitly charged in the "to wit" clause of the indictment. Jurors are "well equipped to analyze the evidence" and reject an "inadequate theory" that was submitted to them under the instructions. *Griffin* v. *United States*, 502 U.S. 46, 59 (1991). And the jury here demonstrated that ability by acquitting petitioner on Count 3.[2]

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[2] Contrary to petitioner's contention (Pet. 6-7), this case thus differs from *Stirone*, 361 U.S. 212. In *Stirone*, an indictment charged the defendant with violating the Hobbs Act based on the theory that the defendant's extortionate conduct affected the interstate movement of sand. At trial, the government offered evidence that the defendant's conduct affected the interstate movement of both sand and steel, and the district court specifically instructed the jury that it could find the defendant guilty based on either theory. The jury returned a general verdict of guilty without indicating whether it had found that the defendant's conduct affected the interstate movement of sand or of steel. Explaining that it was impossible to "know whether the grand jury would have included in its indictment a charge" based on the steel theory, this Court held that the district court committed reversible error because the evidence presented and the district court's charge to the jury constructively amended the indictment such that the jury could have

In addition, as the court of appeals recognized, there was "simply no risk" that petitioner was "impaired by a lack of notice of what crimes were charged." Pet. App. B5. The government devoted "substantial time and testimony," *ibid.*, during its case in chief to establishing that petitioner defrauded Fleet by falsifying his sales figures on his loan application. In its summation, the government urged the jury to convict on Court 4 on the basis of the false sales figures. See 12/20/04 Tr. 1074-1078. It did not call the jury's attention to other false statements that petitioner made in the loan application, such as the statement that petitioner owed no back taxes. *Ibid.*

For similar reasons, petitioner suffered no prejudicial variance for the admission of evidence that differed from the allegations in the indictment. The core of the government's proof and argument was the false sales figures. The government's sole question on cross- examination about petitioner's tax returns—particularly in light of the substantial evidence adduced in support of the false sales figures he included on his loan application—is not sufficient to constitute a prejudicial variance.

c. As petitioner notes (Pet. 8), the Seventh Circuit has taken a different approach from the Second Circuit in interpreting "to wit" clauses, reasoning that "'[t]o wit' is an expression of limitation which * * * makes what follows an essential part of the charged offense."

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convicted the defendant on facts not actually charged in the indictment. *Id.* at 219. In the instant case, by contrast, the jury could not have found petitioner guilty on any basis other than the false sales figures that petitioner included in his loan applications as alleged in the indictment, because there was no evidence that any other false statements were material.

United States v. *Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994); see *United States* v. *Johnson*, 152 F.3d 618, 629 (1998) ("[W]ords of limitation in an indictment such as the words 'to wit' narrow the charge and correspondingly make the language that follows an essential element of the offense."); *United States* v. *Leichtnam*, 948 F.2d 370, 377-378 (1991). The Ninth Circuit, by contrast, has deemed the words following a "to wit" clause to be "surplusage." *United States* v. *Garcia-Paz*, 282 F.3d 1212, 1217, cert. denied, 537 U.S. 938 (2002).

This case, however, does not present a suitable vehicle for addressing the narrow disagreement over the import of a "to wit" clause or the significance, under the Fifth Amendment's Grand Jury Clause, of an evidentiary deviation from a "to wit" clause in an indictment. As discussed above, a rational jury following the instructions given would have convicted petitioner only on the grounds identified in the "to wit" clause. This case therefore does not squarely present the question of whether permitting convictions on some other related basis may impair the protections of the Grand Jury Clause.

Review is also unwarranted because even assuming, *arguendo*, that an error occurred, it should be found harmless whether that error is characterized as a "constructive amendment" or a "variance." To the extent that lower courts have held that a "constructive amendment" is not amenable to harmless-error analysis, see p. 13, *supra*, they have relied principally on this Court's decision in *Stirone*, which held that automatic reversal was warranted when the government proved an element at trial based on a factual theory that deviated from the factual theory advanced in the indictment. 361 U.S. at 217. *Stirone*, however, was decided before this Court's comprehensive adoption of constitutional harmless-error

analysis in *Chapman* v. *California*, 386 U.S. 18, 22 (1967). As Justice Stewart noted in his concurrence in that case, before *Chapman*, this Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42 (collecting cases). Because *Stirone* was decided in an era in which constitutional errors generally required per se reversal, that decision does not control the analysis in this case. In the wake of *Chapman* (and later cases subjecting analogous errors to harmless-error review), harmless-error analysis should be applied to any error resulting from a divergence between the facts specified in the indictment and the facts presented by the government at trial. Cf. *United States* v. *Cotton*, 535 U.S. 625 (2002); *Neder* v. *United States*, 527 U.S. 1 (1999).

Petitioner's entire petition for a writ of certiorari is devoted to the question of whether there was "error"; petitioner does not address whether any error that occurred would be amenable to harmless-error analysis in these circumstances. But, on this record, the single passing mention of petitioner's false statement concerning back taxes was harmless in view of the overwhelming evidence supporting the false sales figure theory and the government's overwhelming emphasis on that theory at trial. If the instructions did leave room for a conviction based on facts other than the allegations in the to wit clause, that room was narrow and not exploited by the prosecutors in this case. The same is true, *a fortiori*, with respect to any claim of variance. Under these circumstances, any claimed violation of the Grand Jury Clause would not have any effect on the disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

ISAAC DAYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

In its brief in opposition to Dayan's petition for a writ of certiorari ("Br. Opp."), the government asks the Court to deny the petition based on what it claims is the "interlocutory posture" of the case as a result of the Second Circuit's vacatur of the restitution order and remand to the district court. Br. Opp. 10-11. The government does not cite a single criminal case in support of is argument, and for good reason. Dayan is not seeking interlocutory review of the judgment of conviction. On the contrary, his conviction is final, and nothing the district court does on remand in regard to restitution will affect Dayan's conviction. *See United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (Court of Appeals mandate directing district court to "reconsider sentencing" and "restitution" issues cannot "reasonably be construed to authorize consideration by the district judge of issues relating to the underlying merits of the conviction").

If the government's argument were to be accepted, no judgment of conviction would ever be final since the federal restitution statute authorizes the district court to amend a restitution order whenever additional losses are discovered. *See* 18 U.S.C. §3664(d)(5); *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004) (restitution order issued 127 days after sentencing was not jurisdictionally barred).

Requiring finality of a restitution order before the Court will review the underlying conviction would also lead to anomalous results. For example, a defendant is required to file a notice of appeal from the judgment of conviction within 10 days of the entry of the judgment, Rule 4(b)(1)(A), F.R.A.P. Yet, the district court is authorized to defer issuing

an order of restitution for up to 90 days after sentencing. 18 U.S.C. §3664(d).[1] As a result, the judgment of conviction, including any term of confinement, and restitution are on different tracks, and waiting for restitution to catch up with the conviction would often result in lengthy confinement, possibly lasting years, before the Court could consider the merits of the underlying conviction.

Nothing in the statute requires such a different result. 28 U.S.C. §1254(1) (the Court may review decisions of the courts of appeals by writ of certiorari "granted upon the petition of any party to any . . . criminal case, before or after rendition of judgment"). In other words, the "interlocutory" doctrine is purely discretionary. Where, as here, any open restitution issue is completely collateral to the merits of the judgment of conviction, the Court can and should grant review now.

Finally, Dayan has incurred the usual expenses associated with retaining counsel to pursue a petition for a writ of certiorari, including legal fees and disbursements. It would be unfair and wasteful to require him to petition again on the same issues after the district court finally resolves the unrelated and collateral issue of restitution. The opposite is true. Review of the judgment of conviction now may obviate or affect restitution, while the district court's resolution of the open restitution issue will never affect the judgment of conviction.

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1. In fact, restitution orders have been issued long after the 90-day period has expired. *See, e.g., United States v. Dando*, 287 F.3d 1007 (10th Cir. 2002) (restitution order issued 176 after sentencing).

II.

The government concedes that where, as here, an indictment specifies "the particular facts that constitute an element of the offense," the government cannot "prove[] different facts at trial to establish that element" without violating the Fifth Amendment's Grand Jury Clause. Br. Opp. 12. The government also concedes that the circuits are divided on the question whether a "to wit" clause in the indictment limits the government's ability to prove guilt on some other basis. Br. Opp. 16-17. Thus, the government concedes the most fundamental basis for review by the Court, i.e., a division among the circuits. U.S. Sup. Ct. Rule 10(a).

Instead, the government is reduced to speculating that the a rational jury could only have convicted Dayan on the basis alleged in the indictment, i.e., allegedly false sales figures for Dayan's company. Of course the government's argument ignores the jury's question which brings the issue into sharp relief:

> Question on counts 3 and 4: Does the definition of "attempt to defraud" include other information on the loan application besides the sales figures, or is the charge based only on the sales figures?

The jury's question can only be understood to reflect the jury's belief that the evidence supported a finding that the subject loan application contained other material, but uncharged, misstatements. The government does not attempt to offer an alternative explanation for the jury's question.

In short, this case squarely presents an important constitutional question concerning the scope of protection provided by the Grand Jury Clause, a question on which the circuits are admittedly confused and divided.

III.

The government claims that the "entire" petition is devoted to the question whether there was any constitutional error, and that petitioner "does not address whether any error that occurred would be amenable to harmless-error analysis." Br. Opp. 18. The government argues that any constitutional error in this case should be deemed harmless and the petition denied on that basis. The government is mistaken on both scores.

The petition's question presented raises the very issue the government claims petitioner ignored, i.e., "Isn't it a violation of the Fifth Amendment's Grand Jury Clause, *requiring reversal*, to permit a jury to convict . . . on a theory of falsity different from the particular one alleged in the indictment. Pet. I (emphasis added). Moreover, in the first paragraph of the section devoted to the reasons for granting the writ, the petition points out that *Stirone v. United States*, 361 U.S. 212 (1960), is understood as the origin of the doctrine of constructive amendment, "which Stirone held to be *per se* reversible error." Pet. 6. Finally, petitioner pointed out that, under constructive amendment jurisprudence, the critical distinction articulated by the courts between constructive amendment and variance is that the former is *per se* reversible error while the latter requires a showing of prejudice. *Id.* Thus, the government fails to appreciate that the petition raises two intertwined and important questions, i.e., what constitutes a constructive amendment within the meaning of the Grand Jury Clause and

Stirone, and whether a constructive amendment can ever be harmless.

The government's contention a violation of the Grand Jury Clause is subject to harmless error analysis has also been repeatedly and recently rejected by every circuit court of appeals, each of which has held since *Chapman v. California*, 386 U.S. 18, 22 (1967), that a constructive amendment is *per se* reversible error and can never be harmless. *See, e.g., United States v. McKee*, ___F.3d.___, 2007 WL 3132417 (3d Cir. Oct. 29, 2007) ("We have held that a constructive amendment is an exceptional category of error because it violates a basic right of criminal defendants, the grand jury guarantee of the Fifth Amendment . . . Thus, where a trial court constructively amends a jury instruction [sic], our plain error analysis presumes prejudice"); *United States v. Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007) ("a constructive amendment of an indictment is reversible error per se"); *United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007) ("Both actual and constructive amendments are considered per se prejudicial and are reversible error"); *United States v. Tampas*, 493 F.3d 1291, 1301 (11th Cir. 2007) ("If he is correct [that the indictment was constructively amended], this is reversible error per se because it violates his Fifth Amendment right to be tried on the charges presented by the grand jury"); *United States v. Ratliff-White*, 493 F.3d 812, 821 (7th Cir. 2007) ("While there exists only a rather shadowy distinction between amendments and variances, a finding of one rather than the other achieves a crystal clear difference in result: amendments have been held to be prejudicial per se, while variances may be subject to the harmless error rule"); *United States v. Hernandez*, 490 F.3d 81, 83 (1st Cir. 2007) ("A constructive amendment is considered prejudicial per se and grounds for reversal of a conviction"); *United States v. Sells*,

477 F.3d 1226, 1237 (10th Cir. 2007) ("constructive amendment . . . is reversible per se"); *United States v. Baugham*, 449 F.3d 167, 176 (D.C. Cir. 2006) ("the more acute divergences (labeled 'constructive amendments') . . . lead to reversal automatically, without a specific inquiry as to harm"); *United States v. Bhagat*, 436 F.3d 1140, 1145 (9th Cir. 2006) ("A constructive amendment mandates *per se* reversal"); *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (reversing conviction on constructive amendment grounds; "[c]onstructive amendment is a *per se* violation of the Fifth Amendment"); *United States v. Nunez*, 180 F.3d 227, 230-231 (5th Cir. 1999) ("a constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged"); *United States v. Floresca*, 38 F.3d 706, 712-14 (4th Cir. 1994) ("under *Stirone*, constructive amendments of a federal indictment are error *per se*, and, under *Olano*, must be corrected on appeal even when not preserved by objection").

Aside from the fact that *Stirone* characterized a constructive amendment "as far too serious to be treated as nothing more than a variance and then dismissed as harmless error," 361 U.S. at 217, the reason for the unanimity among the circuits on the issue of relief seems obvious. Trying a defendant on a charge not found by the grand jury effectively converts an indictment into a charge brought by a prosecutor, precisely the evil against which the Grand Jury Clause was designed to protect. Like the Sixth Amendment right to counsel, the Grand Jury Clause is the epitome of a structural error, and requires reversal even when the error is not preserved. *See Midland Asphalt Corporation v. United States*, 489 U.S. 794, 802 (1989) (Scalia, J.) (interlocutory appeal permitted where defect is so fundamental that it "causes . . . the indictment no longer to be an indictment"). *Id.* at 802.

In the face of the foregoing unbroken and compelling authority, the government's remarkable contention that *Stirone* has been overruled by the Court *sub silentio*, Opp. Br. 17-18, would alone be grounds for granting the petition.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the writ of certiorari should be granted.

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